No. 75-1443

# In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

*v.*

MISTER SANDERS

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

*v.*

MISTER SANDERS

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 522 F.2d 1167. The memorandum of the district court (App. C, *infra*) is not reported.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 12, 1975. A timely petition for rehearing was denied on December 12, 1975 (App. D, *infra*). On March 4, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a decision by the Secretary of Health, Education, and Welfare not to reopen a previously adjudicated claim for Social Security benefits is subject to judicial review under the Administrative Procedure Act.

This question has two components:

1. Whether Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen prior final decisions denying claims for benefits under that Act.

2. Whether Section 10 of the Administrative Procedure Act grants subject-matter jurisdiction to the district courts to review agency action.

## STATUTES AND REGULATIONS INVOLVED

Section 205 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 405, Section 10 the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the regulations of the Department of Health, Education,



and Welfare, are set forth in pertinent part in Appendix E, *infra*.

## STATEMENT

In 1964, respondent filed a claim for Social Security disability benefits.[1] Following an evidentiary hearing on the claim, the hearing examiner determined that respondent had not been disabled within the meaning of the Social Security Act on June 30, 1962, the date his insured status had expired (App. A, *infra*, p. 2a). On review, the Appeals Council sustained the decision of the hearing examiner. Respondent was notified of his right to seek judicial review of the final decision of the Secretary, but review was not sought (App. C, *infra*, p. 14a).

Almost seven years later, on March 15, 1973, respondent filed another application for disability benefits. After the claim was denied initially and upon

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[1] A claim for disability benefits is initiated by the filing of an application with the Social Security Administration. If the application is denied initially, the claimant is entitled, upon request, to reconsideration of the initial determination. 20 C.F.R. 404.910. If the claimant is still dissatisfied with the decision after reconsideration, he can obtain, upon request, an evidentiary hearing before an administrative law judge (originally, a hearing examiner). 20 C.F.R. 404.917. Further administrative review may be sought from the Appeals Council, which, in its discretion, may review the administrative law judge's decision. 20 C.F.R. 404.947. Following the action of the Appeals Council, a claimant may obtain judicial review in a civil action brought in the district court under 42 U.S.C. 405(g). At each stage of the administrative proceedings, a decision rendered on the claim becomes the final decision of the Secretary unless further review is timely sought. 20 C.F.R. 404.908, 404.916, 404.940, 404.951.

reconsideration, respondent requested a hearing (App. A, *infra*, p. 2a).

The administrative law judge, noting that respondent had not met the earnings requirement for insured status since the denial of his earlier claim, determined that the application was barred by the doctrine of *res judicata* and therefore dismissed the request for a hearing.[2] The administrative law judge further determined that, because more than four years had elapsed since respondent's earlier claim had been initially denied, the prior final decision on that claim could be reopened only to correct error on the face of the evidence on which the decision had been based.[3] The administrative law judge ruled that respondent had failed to show that there was such error and that, therefore, the prior final decision could not be reopened. The Appeals Council concluded that the action of the administrative law judge was correct (App. C, *infra*, p. 13a).

Respondent then filed this civil action in the United States District Court for the Northern District of Indiana, seeking review of the Secretary's refusal to reopen the prior final decision. The district court held that it was without jurisdiction to review the Secretary's refusal to reopen a prior final decision (App. C, *infra*, p. 14a).

The court of appeals, in 2-1 decision, reversed. The court agreed with the Secretary that jurisdiction to

[2] See 20 C.F.R. 404.937 (App. E, *infra*, pp. 20a-21a).

[3] See 20 C.F.R. 404.957 (App. E, *infra*, p. 21a).



review a refusal to reopen was not conferred by the Social Security Act (App. A, *infra*, p. 5a). But the court reasoned that jurisdiction generally was conferred by Section 10 of the Administrative Procedure Act, 5 U.S.C. 701 through 706, and determined that none of the exceptions of that Act apply here.

In particular, the court held that Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), does not "preclude judicial review" (5 U.S.C. 701(a)(1)) and that the Secretary's decision whether to reopen a prior final decision is not "committed to agency discretion by law" (5 U.S.C. 701(a)(2)). In so holding, however, the court acknowledged that "[t]he circuits are divided [both] on the question of whether section 10 of the Administrative Procedure Act * * * contains an independent grant of subject-matter jurisdiction * * * [and] on the question whether [Section 2]05(h) of the Social Security Act bars review under the APA" (App. A, *infra*, pp. 5a, 6a).

Judge Bauer dissented on the ground that "the simple language of the statute involved forbids judicial review of the decision of the Secretary not to reopen the determination" (App. A, *infra*, pp. 9a-10a).[4]

## REASONS FOR GRANTING REVIEW

The courts of appeals are in conflict over whether Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen

[4] The panel subsequently denied rehearing, and the full Seventh Circuit, with two judges dissenting, declined the suggestion for rehearing *en banc* (App. D, *infra*, pp. 15a-18a).

prior final decisions denying claims under that Act and also over whether Section 10 of the Administrative Procedure Act grants subject-matter jurisdiction to review agency action. Both issues are important and recurring.

The conflict over the interpretation of the Social Security Act has created substantial differences in the procedures available to social security claimants in different circuits. Moreover, if, as we contend, and as this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, logically implies, that Act bars judicial review of the Secretary's refusal to reopen prior final decisions, the court below, and other courts in agreement with it, have imposed upon both the Secretary and the lower courts administrative, litigative, and adjudicative burdens significantly heavier than those contemplated by Congress.

The conflict over the interpretation of the Administrative Procedure Act has created substantial differences in the scope of jurisdiction exercised by the lower federal courts in different circuits. Because of the pervasive reach of the Administrative Procedure Act, which establishes standards for judicial review of "agency action," with specific exceptions, whether that Act independently confers subject-matter jurisdiction is a major unresolved question relating to the jurisdiction of the federal courts.

1. *Section 205(h) of the Social Security Act precludes judicial review of the Secretary's refusal to reopen prior final decisions denying claims for benefits under that Act.*



a. Section 205(g) of the Social Security Act permits a claimant to obtain review only of a "final decision of the Secretary made after a hearing." That provision does not allow review of decisions that may be made without a hearing. *Filice* v. *Celebrezze*, 319 F. 2d 443 (C.A. 9).[5] A petition to reopen a prior final decision may, as here, be denied without a hearing. Section 205(b) of the Act; see, *e.g.*, *Cappadora* v. *Celebrezze*, 356 F.2d 1, 4 (C.A. 2); *Ortego* v. *Weinberger*, 516 F.2d 1005, 1007 (C.A. 5); *Filice* v. *Celebrezze*, *supra*, 319 F.2d at 445-446. Thus the court of appeals correctly began its analysis by observing that the Social Security Act does not itself confer jurisdiction to review the Secretary's refusal to reopen a prior decision (App. A, *infra*, p. 5a). On this preliminary matter, the courts of appeals are in general agreement. See *Cappadora* v. *Celebrezze*, *supra*; *Davis* v. *Richardson*, 460 F. 2d 772 (C.A. 3); *Ortego* v. *Weinberger*, *supra*; *Hunt* v. *Weinberger*, 527 F. 2d 544 (C.A. 6); *Stuckey* v. *Weinberger*, 488 F. 2d 904 (C.A. 9) (*en banc*); *Hobby* v. *Hodges*, 215 F. 2d 754 (C.A. 10).

The courts of appeals part company, however, on the further question whether the Social Security Act comprehensively forbids review of such determinations of the Secretary. The Ninth Circuit, in *Stuckey* v. *Weinberger*, *supra*, held that Section 205(h) of

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[5] This result is not affected by this Court's holding in *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, that in some circumstances a claimant need not await a hearing to which he is entitled before bringing suit.

the Act precludes judicial review of the Secretary's determination not to reopen a prior final decision, at least where, as here, the prior decision was made after a hearing. Several other courts of appeals, including the court below in this case, have reached the opposite conclusion. See *Ruiz-Olan* v. *Secretary of Health, Education, and Welfare*, 511 F. 2d 1056 (C.A. 1); *Davis* v. *Richardson*, *supra*; *Lejeune* v. *Mathews*, 526 F. 2d 950 (C.A. 5); *Wallace* v. *Weinberger*, 528 F. 2d 700 (C.A. 6). Cf. *Cappadora* v. *Celebrezze*, *supra*.

Section 205(h) does preclude review. As this Court pointed out in *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757, the *second* sentence of that provision [6] bars the district courts from reviewing decisions of the Secretary, "save as provided [by Section 205(g) of] the Act." Since, as the court of appeals acknowledged, review here was not available under Section 205(g) (see pp. 4 and 7, *supra*), it was not available at all.

The court of appeals ignored the second sentence of Section 205(h), however, reading the jurisdictional holding in *Salfi* as limited to the proposition that the *third* sentence of that provision [7] bars only

[6] The second sentence of Section 205(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided."

[7] The third sentence of Section 205(h) provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 41 of the Judicial Code of the United States to recover on any claim arising under this subchapter."



actions brought under 28 U.S.C. 1331 (App. A, *infra*, pp. 8a-9a). In fact, jurisdiction in *Salfi*, as here, had been alleged under, *inter alia*, the Administrative Procedure Act (see p. 7 of the *Salfi* Appendix), and this Court, in dismissing the claims of the unnamed class members, ruled that "sources of jurisdiction [other than Section 205(g) are] foreclosed by [Section 2]05(h)." 422 U.S. at 764. Accordingly, as we demonstrate at greater length at pp. 13-18 of our brief in *Norton* v. *Mathews*, No. 74-6212, argued January 13, 1976,[8] the third sentence of Section 205(h) bars the district courts from asserting jurisdiction over Social Security cases under either the mandamus statute, 28 U.S.C. 1361, or the Administrative Procedure Act.

In short, Section 205(h) doubly "preclude[s] judicial review" (5 U.S.C. 701(a)(1)): the third sentence of Section 205(h), which the court of appeals misconstrued, bars review of Social Security cases under the Administrative Procedure Act, and the second sentence of the statute, which the court disregarded, bars judicial review of reopening decisions altogether.

b. The decision below frustrates the policy of administrative finality that underlies the congressional determination to bar review of refusals to reopen prior final decisions. If such refusals are made subject to judicial review, "[p]ersistent claimants could relitigate claims numerous times in hopes of securing a favorable decision, at great cost to both the [Social

[8] We are furnishing a copy of our brief in *Norton* to respondent's counsel.

Security Administration] and the courts." *Stuckey* v. *Weinberger*, *supra*, 488 F. 2d at 910.

The volume of potential relitigation is substantial. The Secretary estimates that in calendar year 1975 approximately 2,400 requests for hearings were denied on the ground of *res judicata*; in the brief period of time since the decision in this case was handed down, at least three more courts of appeals have been required to adjudicate cases arising from refusals to reopen in such situations. See *Coulter* v. *Weinberger*, 527 F. 2d 224 (C.A. 3); *Lejeune* v. *Mathews*, *supra*; *Hunt* v. *Weinberger*, *supra*. Unless the decision below is reversed, cases like these can be expected to place a continuing and growing burden on the Secretary and the courts, a burden Congress never intended to impose.

2. *Section 10 of the Administrative Procedure Act does not grant subject-matter jurisdiction to the district courts to review agency action.*

Congress should not be presumed to have conferred subject-matter jurisdiction on the district courts, in a statute not otherwise dealing with jurisdictional matters, unless the statutory language, or at a minimum the legislative history, expresses a clear intention to grant jurisdiction. Cf. *Romero* v. *International Terminal Co.*, 358 U.S. 354, 379. Section 10 of the Administrative Procedure Act establishes the procedures and manner of judicial review of agency action, but it does not purport by its terms to enlarge the jurisdiction of the district courts. To the contrary, "where the statutory method of review is either absent or inadequate, the only remedy of an aggrieved party [under Section 10] is 'any applicable form of legal action * * * in any court of competent jurisdiction.'" *Local 542, International Union of Operating Engineers* v. *National Labor Relations Board*, 328 F. 2d 850, 854 (C.A. 3), certiorari denied, 379 U.S. 826.



The legislative history of the provision is similarly devoid of any evidence of a congressional intent to confer additional jurisdiction on the district courts. The Department of Justice played an active role in the drafting of the Administrative Procedure Act,[9] and the Attorney General advised Congress that Section 10 simply "declares the existing law concerning judicial review." Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., p. 229 (1946). This construction apparently was not challenged during congressional consideration of the bill.

Accordingly, the court of appeals erred in holding that Section 10 grants jurisdiction to review agency action. See, *e.g.*, Note, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers—Jurisdictional Amount, The Administrative Procedure Act and Mandamus*, 51 Wash. L. Rev. 97, 108-115 (1975). But the courts of appeals are sharply divided on this question.

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[9] See *Attorney General's Manual on the Administrative Procedure Act* 5-6, 8 (1947).

In addition to the court below, the First,[10] Fourth,[11] Fifth,[12] Tenth,[13] and District of Columbia Circuits [14] have held that jurisdiction is conferred by the Administrative Procedure Act, while the Third,[15] Sixth,[16] Eighth,[17] and Ninth Circuits [18] have held that it is not.[19] The time is ripe for resolution of this long-standing conflict on a fundamental issue of federal jurisdiction.

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[10] *Elton Orchards, Inc.* v. *Brennan*, 508 F. 2d 493 (C.A. 1).

[11] *McEachern* v. *United States*, 321 F. 2d 31 (C.A. 4).

[12] *Ortego* v. *Weinberger*, *supra*.

[13] *Bard* v. *Seamans*, 507 F. 2d 765 (C.A. 10).

[14] *Pickus* v. *United States Board of Parole*, 507 F. 2d 1107 (C.A.D.C.).

[15] *Grant* v. *Hogan*, 505 F. 2d 1220 (C.A. 3).

[16] *Bramblett* v. *Desobry*, 490 F. 2d 405 (C.A. 6), certiorari denied, 419 U.S. 872. But see *Hunt* v. *Weinberger*, *supra*.

[17] *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 (C.A. 8).

[18] *Nguyen da Yen* v. *Kissinger*, Nos. 75-2493 and 75-2632, decided November 5, 1975 (C.A. 9).

[19] The Second Circuit considers the question open. *Aguayo* v. *Richardson*, 473 F. 2d 1090, 1101-1102 (C.A. 2), certiorari denied, 414 U.S. 1146.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1976.

**APPENDIX A**

# IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

*v.*

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

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Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146
ALLEN SHARP, *Judge*

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Argued May 28, 1975 Decided September 12, 1975

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Before TUTTLE,* TONE and BAUER, *Circuit Judges.*

TUTTLE, *Circuit Judge.* Mister Sanders appeals the order of the district court dismissing his complaint challenging the refusal of the Secretary of Health, Education and Welfare to reopen or recon-

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* Honorable Elbert P. Tuttle, United States Circuit Judge, Fifth Circuit, sitting by designation.

sider a 1966 disallowance of his claim for Social Security benefits. The sole question which we consider on appeal is whether the district court had jurisdiction to review the Secretary's decision. We conclude that there was jurisdiction, and accordingly we reverse.

The plaintiff applied in 1964 for Social Security disability benefits claiming that he was disabled due to a mental impairment, and that this disability arose prior to the expiration of his insured status under the Act, 42 U.S.C. §§ 416(i), 423. This claim was denied.[1] A final agency order was entered. Judicial review of this order was not sought. The plaintiff made his second application in 1973, almost seven years after final agency action on his earlier application. This application was denied on the grounds of the prior determinations' effect, *res judicata*, and the plaintiff's request for an administrative hearing and administrative review of this denial were similarly denied on the grounds of *res judicata*. Section 405(h) of the Act provides:

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided."

[1] We will not discuss the merits of the plaintiff's claim. As the Secretary failed to file a certified copy of the administrative record in the case below, the plaintiff has not had the opportunity fully to develop his case as to whether there was error on the face of the record. Counsel for plaintiff at oral argument, in response to our questions, stated several possible errors, and it is enough for the purposes of this appeal that the plaintiff's claim of error on the face of the record is not clearly without merit.



Under the Act, a claimant may seek judicial review of a final agency order denying disability benefits if the request for review is filed within sixty days. 42 U.S.C. § 405(g). Such review is limited to a determination whether there was substantial evidence to support the agency findings.[2]

Pursuant to his statutory authority, the Secretary has promulgated regulations which define the circumstances under which decisions become final and under which final decisions may be reopened.[3] 20 C.F.R. § 404.937 provides that the agency may dismiss a request for a hearing on the grounds of *res judicata*:

> "(a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial affirmance or, without judicial consideration, upon the claim-

[2] Section 405(g) provides in relevant part: "The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . ."

[3] Section 405(a) gives the Secretary "full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of [Title II], which are necessary or appropriate to carry out such provisions."

> ant's failure timely to request reconsideration hearing, or review or to commence a civil action with respect to such determination or decision."

The regulations also provide that a final adverse decision may be reopened within 12 months, and may be reopened after 12 months but within four years of the initial determination, upon a showing of "good cause" [4] which is defined in 20 C.F.R. §§ 404.958(a) and 404.957(c)(8). "Good cause" includes a showing of new and material facts, or "for the purpose of correcting clerical error or error on the face of the evidence on which [the] determination or decision was based."

Because the plaintiff failed to request that his application's denial be reopened within four years, the administrative law judge held that the Secretary's earlier adverse decision could only be reopened pursuant to 20 C.F.R. § 404.957(c) (8) for error on the face of the evidence, and that no such error on the face of the evidence had been shown.[5]

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[4] 20 C.F.R. § 404.957(a) provides simply that an adverse determination may be reopened within 12 months of the initial determination; 20 C.F.R. § 404.957(b) provides for the longer four year period upon a showing of "good cause."

[5] This regulatory maze has been aptly described as "a model of what regulations addressed mostly to laymen—or even to lawyers—ought not to be." Cappadora v. Celebrezze, 356 F.2d 1, 3 n.1 (2d Cir. 1966). 20 C.F.R. § 404.957(c)(8) permits reopening an adverse decision "[a]t any time" but only when "[s]uch . . . decision is unfavorable . . . to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such . . . decision was based."



As we have noted, until shortly before oral argument in this case counsel for the plaintiff did not have a copy of the administrative record in the earlier adverse determination and was thus understandably limited in his ability to make a showing of error "on the face of the evidence." The question before us is whether the decision of the agency not to reopen the prior determination is reviewable for an abuse of discretion.

It seems quite clear that the Act itself does not expressly authorize such review. Section 405(h), the Secretary argues, precludes judicial review save as it is expressly authorized by the Act itself. Thus, the Secretary argues, the review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, are inapplicable. We disagree.

The circuits are divided on the question of whether section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, contains an independent grant of subject-matter jurisdiction, without regard to the amount in controversy. We choose to follow those circuits which hold that it does. See *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Bradley* v. *Weinberger*, 483 F.2d 410 (1st Cir. 1973); *Brennan* v. *Udall*, 379 F.2d 803 (10th Cir. 1967); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961); *cf. Brandt* v. *Hickel*, 427 F.2d 53, 55 n. 2 (9th Cir. 1970). See also Davis, *Administrative Law Treatise* § 23.02 (Supp. 1970).[6]

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[6] Contra: *Bramblett* v. *Desobry*, 490 F.2d 405 (6th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974); *Zimmerman* v.

In particular, the Act authorizes judicial review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, except:

> "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

The circuits are likewise split on the question whether § 405(h) of the Social Security Act bars review under the APA. In our view the leading case of *Cappadora* v. *Celebrezze*, 356 F.2d 1 (2d Cir. 1966), was correctly decided, and in so holding we join the First, Third and Sixth Circuits. *Enrique Ruiz-Olan* v. *Secre-*

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*United States Government*, 422 F.2d 326 (3d Cir. 1970), *cert. denied*, 399 U.S. 911 (1970); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967), but see *State Highway Commission of Missouri* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973). Rulings on the Second Circuit are inconclusive on the question. *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F.2d 912, 914 (2d Cir. 1960), *cert. denied*, 364 U.S. 894 (1960), holds that section 10 of the Administrative Procedure Act does not independently confer federal jurisdiction. *Cappadora* v. *Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966), however, discussed in the text, *infra*, assumes that it does. See *Toilet Goods Ass'n* v. *Gardner*, 360 F.2d 677, 679 n. 1 (2d Cir. 1967), *aff'd*, 387 U.S. 158 (1967). But compare *Wolff* v. *Selective Service Board*, 372 F.2d 817, 826 (2d Cir. 1967). And see *Mills* v. *Richardson*, 464 F.2d 995, 1001 n. 9 (2d Cir. 1972), stating that the question had not yet been determined in the Second Circuit. This confusion is recognized in *Aguayo* v. *Richardson*, 473 F.2d 1090, 1101-1102 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). As Judge Friendly observed in the latter opinion, judicial and academic writers differ on whether the Supreme Court has taken a position on this question in *Rusk* v. *Cort*, 369 U.S. 367 (1962), and *Flast* v. *Cohen*, 392 U.S. 83 (1968).



*tary of HEW*, 511 F.2d 1056 (1st Cir. 1975); *Davis* v. *Richardson*, 460 F.2d 772 (3d Cir. 1972); *Maddox* v. *Richardson*, 464 F.2d 617 (6th Cir. 1972).[7]

Since *Cappadora* was decided in 1966 there has been an enormous expansion in the case law construing the non-reviewability provisions of the APA. The Supreme Court has held that there is virtually a presumption of judicial review of administrative action. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), unless a contrary purpose is fairly discernible in the statutory scheme, *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970). Agency action is normally found to be non-reviewable "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 141. Clearly the absence of statutory language expressly authorizing judicial review is insufficient to offset the presumption that administrative action is reviewable. "Indeed, judicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970).

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[7] The Ninth and Tenth Circuits have held the contrary, that review is precluded by 42 U.S.C. § 405(h). *Stuckey* v. *Weinberger*, 488 F.2d 904 (9th Cir. 1973); *Wallace* v. *Weinberger*, 488 F.2d 606 (9th Cir. 1973) *cert. denied*, 417 U.S. 91[illegible] (1974); *Neighbors* v. *Secretary of HEW*, —— F.2d —— (10th Cir., August 5, 1974). We note that the Ninth Circuit's *en banc* consideration of the question resulted in a sharply divided court.

Without the benefit of this guidance from the Supreme Court, the Second Circuit found that the language of § 405(h) did not expressly preclude judicial review of the Secretary's refusal to reopen a determination:

> "[We] do not believe that Congress would have wished to close the doors of the courts to a plaintiff whose claim for social security benefits was denied because of an unreasonable or inappropriate agency rule on reopening or because of a truly arbitrary administrative decision.... Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual." *Cappadora, supra*, 356 F.2d at 6.

Following submission and oral argument the Supreme Court has decided *Weinberger* v. *Salfi*, 95 S.Ct. 2457 (1975). The government, by supplemental brief, contends that this decision establishes the proposition that there can be no review in this case. We conclude that it does not. What, and all that, was before the Court in *Salfi* was whether a denial of benefits could be reviewed by a court proceeding under 28 U.S.C. § 1331. The Court held that the specific terms of § 405 (h), "[n]o action against the United States, (or) the Secretary . . . shall be brought under [§§ 1331 *et seq.*] of Title 28 to recover on any claim . . ." barred suit under § 1331. The Court did not consider the review provisions of the Administrative Procedure Act, however, as it found that review was



proper under § 405(g) of the Act. The decision is thus inapposite to the case before us.

In our view the *Cappadora* court correctly construed the § 405(h) language forbidding review "except as herein provided" to apply only to judicial review of final administrative orders on the merits of a claim:

> "Although it could be argued that the second sentence of § 405(h) of the Social Security Act is a statutory preclusion of such review [of a decision not to reopen what had become a final determination], the more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than that provided in § 405(g)." 356 F. 2d at 5. .

We further agree with *Cappadora* that the decision to reopen a determination has not been left to the unreviewable discretion of the agency. Accordingly the district court possessed jurisdiction under the Administrative Procedure Act to review the Secretary's refusal to reopen the plaintiff's adverse determination. We remand for consideration by the district court as to whether the Secretary abused his discretion in failing to reopen the determination.

Reversed and Remanded for further proceedings not inconsistent with this opinion.

BAUER, *Circuit Judge*, dissenting. I feel compelled to dissent. It seems to me the simple language of the

statute involved forbids judicial review of the decision of the Secretary not to reopen the determination. I would, therefore, affirm.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit



## APPENDIX B

OPINION BY JUDGE TUTTLE

(JUDGE BAUER DISSENTS)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

SEPTEMBER 12, 1975

Before

HON. ELBERT P. TUTTLE, Circuit Judge *
HON. PHILIP W. TONE, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

*vs.*

CASPAR WEINBERGER, ETC., DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146
ALLEN SHARP, *Judge*

* Honorable Elbert P. Tuttle, United States District Judge, Fifth Circuit, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, with costs, in accordance with the opinion of this Court filed this date.



## APPENDIX C

## UNITED STATES DISTRICT COURT
## NORTHERN DISTRICT OF INDIANA
## HAMMOND DIVISION

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Civil No. H 74-146

[Filed Nov. 15, 1974]

MISTER SANDERS

*v.*

CASPAR WEINBERGER, Secretary of Dept. of Health, Education and Welfare

### ORDER

The Defendant's MOTION TO DISMISS is GRANTED. The cause is ordered dismissed as this court is without jurisdiction over the subject matter of this suit.
ENTER: November 15, 1974

/s/ Allen Sharp
Judge, U. S. District Court

### MEMORANDUM

This cause was filed after an order of the Appeals Council affirming the dismissal of plaintiff's action by the Administrative Law Judge. That determination was based upon the doctrine of res judicata—stating

that the prior determination dated February 24, 1966 stands as the final determination of the Department. Plaintiff filed no civil action subsequent to the 1966 dismissal.

Plaintiff relies upon the case of *Ortiz v. Secretary of H.E.W.* to uphold his position that the affidavit and supporting documents attached to the Motion to Dismiss are insufficient to sustain the res judicata defense. *Ortiz, Id.*, 355 F.Supp. 318, (D.C. P.R. 1973). The court in Ortiz denied the motion to dismiss because there was no showing that the hearing examiner included findings that the case had been considered for possible reopening pursuant to 20 CFR 404.957 when the examiner dismissed the Ortiz case under 20 CFR 404.937(a). That is not the situation in the instant case. In Exhibit 1 attached to the memorandum, the Administrative Law Judge, on January 15, 1973, specifically included the issue of possible reopening before dismissing the action because it was res judicata.

There is no compelling reason for the court to order a complete transcript as requested by the plaintiff when the item lacking in the *Ortiz* case is specifically referred to in the Order of Dismissal of January 15, 1973.

Therefore, this court is without jurisdiction to consider the subject matter of this suit and the dismissal is ordered to be entered accordingly.



## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

DECEMBER 12, 1975

Before

HON. ELBERT P. TUTTLE, Senior Circuit Judge *
HON. PHILIP W. TONE, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge

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No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

*vs.*

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

---

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146

ALLEN SHARP, *Judge*

---

* Senior Circuit Judge Elbert P. Tuttle of the United States Court of Appeals for the Fifth Circuit is sitting by designation.

## ORDER

On consideration of the petition for rehearing of the defendant-appellee and the majority of the panel having voted to deny the petition for rehearing,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

Judge Bauer would grant the petition for rehearing.



UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

DECEMBER 12, 1975

Before

HON. THOMAS E. FAIRCHILD, Chief Judge
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILBUR F. PELL, JR., Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge
HON. PHILIP W. TONE, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge

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No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

*vs.*

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

---

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division—No. H 74 C 146

ALLEN SHARP, *Judge*

---

## ORDER

On consideration of the suggestion for rehearing *en banc* filed in the above-entitled cause, a vote on the suggestion having been called for, and a majority of the active members of the court having voted to deny a rehearing *en banc*,

IT IS ORDERED that the suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

Judges Pell and Bauer would rehear the appeal *en banc*.



## APPENDIX E

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *

2. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

3. The Administrative Procedure Act, 5 U.S.C. 701(a), provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

4. The Administrative Procedure Act, 5 U.S.C. 703, provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5. The Administrative Procedure Act, 5 U.S.C. 704, provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. * * *

6. 20 C.F.R. 404.937 provides in part:

> The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claim-



> ant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision * * *.

7. 20 C.F.R. 404.957 provides in part:

> An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final * * * may be reopened:
>
> (a) Within 12 months from the date of the notice of the initial determination * * * to the party to such determination, or
>
> (b) After such 12-month period, but within 4 years after the date of the notice of the initial determination * * * to the party to such determination, upon a finding of good cause for reopening such determination or decision, or
>
> (c) At any time when:
>
> * * * *
>
> (8) Such * * * determination or decision * * * is unfavorable * * * to the party thereto but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based.
>
> * * * *

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